IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3113 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAGDISHBHAI ARJANBHAI MAKWANA

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 3113 of 2004

MR KS ACHARYA for Petitioner No. 1-2

MR SAMIR J DAVE for Respondent No. 1

M/S TRIVEDI & GUPTA for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 07/07/2004

ORAL JUDGEMENT

Though served, respondent No.3 has neither remained present nor any advocate appeared on its behalf.

Learned advocate for the petitioners Shri Acharya submits that respondent No.3 is a formal party and therefore, he seeks permission to delete respondent No.3. Permission granted. Respondent No.3 stands deleted.

2. Rule. Mr.Samir Dave and Mr.Thakar appearing for the respective respondents waives service of notice of rule. At the request of the learned advocates appearing for the parties, the petition is taken up or final disposal today.

3. The short question required to be considered in the present petition is whether the order dated 7.2.2003 passed by the Government of India, Ministry of Labour in refusing to refer the dispute for adjudication sought to be raised by the petitioners is legal or not. The short facts leading to the present petition are that the petitioners had by letter dated 23.7.2001 written to the Assistant Labour Commissioner (Central), Ahmedabad raised a demand to the effect that the so called contract under which the employees are engaged by the ONGC is sham arrangement and for further treating the petitioners as employees of ONGC and for being paid wages as Class IV employees from the date of appointment with all consequential benefits. It is not in dispute that the conciliation proceedings between the parties failed and that therefore the failure report came to be submitted by the Assistant Labour Commissioner (Central) Ahmedabad on 11th July 2002. Based on this failure report, the respondent No.1 by the order dated 7.2.2003 was pleased to hold that the Ministry does not consider the dispute for adjudication for the reason that "the workmen were not appointed by the management of ONGC".

4. Learned advocate for the petitioner has submitted that the said order dated 7.2.2003 is illegal and unlawful and that the respondent No.1 had no power or authority to refuse to refer the dispute for adjudication. He has submitted that the same be quashed and set aside. It is the case of the petitioners that the respondent No.1 could not have considered the matter on merits and the respondent No.1 has therefore erred in law in passing the order dated 7.2.2003. In the letter of demand dated 23rd July 2001, the petitioners have specifically stated that the work on which the petitioners are working is of perennial nature and that the petitioners are doing the same work as being performed by similarly situated employees of ONGC. It was also the case of the petitioners that the ONGC has under the guise of sham contract exploited the petitioners and they are not paid the wages on the same

level as that of similarly situated employees. On the basis of these assertions, the petitioners had demanded that the so called contract be declared as sham arrangement and that the petitioner be paid wages at par with class IV employees of the ONGC.

5. The Hon'ble Supreme Court has held that the Government should be very slow to attempt an examination of demand with a view to decline reference and the Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. In a decision reported in AIR 1985 SC 860 (M.P.Irrigation Karamchari Sangh v. State of M.P.), the Hon'ble Supreme Court has observed as follows:-

> "There may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should be very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render S.10 and S.12(95) of the Industrial Disputes Act nugatory."

In a decision reported in AIR 1985 SC 915 (Ram Avtar v. State of Haryana), the Hon'ble Supreme Court held to the effect that if the Government performs an administrative act while making or refusing to make a reference under section 10(1), it cannot delve into the merits of the dispute and take upon itself the determination of lis and that would certainly in excess of the power conferred by S.10. It was further held that section 10 of the said Act requires the appropriate Government to be satisfied that an industrial dispute exists or is apprehended. This may permit the appropriate Government to determine prima facie whether an industrial dispute exists or the claim is frivolous or bogus or put forth for extraneous or irrelevant reasons. It was further held that if the administrative determination is based on grounds irrelevant, extraneous or not germane to the exercise of power, it is liable to be questioned in exercise of the power of judicial review and the Court in such a case would direct the Government to reconsider its decision.

6. In a decision reported in AIR 1989 SC 1565 (Telco Convoy Drives Mazdoor Sangh v. State of Bihar), the Hon'ble Supreme Court once again observed that while

exercising power under section 10(1), the function of the appropriate Government is an administrative function and not a judicial or quasi judicial function and that in performing this administrative function, the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis which would be in excess of the power conferred on it by section 10. The Hon'ble Supreme Court further observed that though it is true that in considering the question of making reference under section 10(1) of the Act, the Government is entitled to form an opinion as to whether an industrial dispute exists or is apprehended, but that formation of opinion as to whether an industrial dispute exists or is apprehended is not the same thing as to adjudicate the dispute itself on its merits. In yet another decision reported in AIR 2002 SC 1724 (Sharad Kumar v. NCT of Delhi), the Hon'ble Supreme Court while deciding the question of refusing to make a reference by the Government on the ground that Area Sales Manager is not a workman held that decision on such a question requires examination of factual matters for which materials including oral evidence shall have to be considered and in such a matter the State Government could not arrogate on itself power to adjudicate on the question thereby terminating the proceedings prematurely. The Hon'ble Supreme Court has made the following observations:

"Testing the case in hand on the touchstone of the principles laid down in the decided cases we have no hesitation to hold that the High Court was clearly in error in confirming the order of rejection of reference passed by the State Government merely taking note of the designation of the post held by the respondent i.e. Area Sales Executive. As noted earlier determination of this question depends on the types of duties assigned to or discharged by the employee and not merely on the designation of the post held by him. We do not find that the State Government or even the High Court has made any attempt to go into the different types of duties discharged by the respondent with a view to ascertain whether he came within the meaning of Section 2(s) of the Act. The State Government, as noted earlier, merely considered the designation of the post held by him which is extraneous to the matters relevant for the purpose. From the appointment order dated 21/22 April, 1983 in which are enumerated certain duties which the appellant maybe required to discharge it cannot be held therefrom that he did not come within the first

> portion of Section 2(s) of the Act. We are of the view that determination of the question requires examination of factual matters for which materials including oral evidence will have to be considered. In such a matter the State Government could not arrogate on to itself the power to adjudicate on the question and hold that the respondent was not a workman within the meaning of Section 2(s) of the Act, thereby terminating the proceedings prematurely. Such a matter should be decided by the Industrial Tribunal or Labour Court on the basis of the materials to be placed before it by the parties. Thus the rejection order passed by the State Government is clearly erroneous and the order passed by the High Court maintaining the same is unsustainable."

Applying the above settled principles of law to the facts of the present case, I find that the workmen had sought to raise an industrial dispute with respect to the genuineness of the so called contract through which the petitioners were employed and it was the case of the petitioners that they were in effect directly employed by the ONGC and the contract was sham. In my view, this question can be decided only after leading evidence and that therefore it was not possible or permissible for the Government to come to a conclusion that the workmen were not appointed by the Management of ONGC. As held by the Hon'ble Supreme Court in above referred decisions, the said question ought to have been left open for the Labour Court/Industrial Tribunal to decide and it was not open for the Government to come to a final conclusion in this regard and reject the request of the petitioners to refer the dispute for adjudication. In my view, therefore, the respondent No.1 acted without jurisdiction and exceeded the powers conferred on it under section 10(1) of the Industrial Disputes Act.

7. The impugned order dated 7.2.2003 is therefore quashed and set-aside and the respondent No.1 is directed to reconsider the question of referring the dispute for adjudication before the Labour Court/Industrial Tibunal keeping in view the above observations and decide the same within a period of two months from the date of receipt of this order. The petition accordingly stands disposed of. Rule is made absolute to the above extent with no order as to costs.

(Akil Kureshi, J.)
(vjn)